LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 24 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 972

JOSEPH MUSTACCHIO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DINO D. BLIABLIAS,
Counsel for Petitioner,
11 Commerce Street,
Newark, New Jersey, 07102.

KENNETH J. MCGUIRE,
On the Petition.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

	PAGE
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED FOR REVIEW	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	14
APPENDIX:	
A—Opinion of the Court	1a
Judgment	8a
B—Statutory Provisions Cited	9a
C—Transcript	14a

Cases Cited

Agnew v. United States, 165 U. S. 36 (1897)	8
Block v. United States, 221 F. 2d 786 (9th Cir. 1955)	9
Bollenbach v. United States, 326 U. S. 607 (1946)	11
Chappell v. United States, 270 F. 2d 274 (9th Cir. 1959)	9
Cohen v. United States, 378 F. 2d 751 (9th Cir. 1967)	9
Everitt v. United States, 281 F. 2d 429 (C. A. Fla. 1960)	5

PAGE

Imholte v. United States, 226 F. 2d 585 (8th Cir. 1955) 9

Mann v. United States, 319 F. 2d 404 (5th Cir. 1963) 9

Maye v. Pescor, 162 F. 2d 641 (C. C. A. Mo. 1947), affirmed, 214 F. 2d 860..... 5

Mitchell v. United States, 259 F. 2d 787, certiorari denied, 358 U. S. 850 (1958)..... 5

Moore v. United States, 375 F. 2d 877 (8th Cir. 1967) 9

Neely v. United States, 274 F. 2d 389 (9th Cir. 1960) 6

Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947) 5

United States v. Barash, 365 F. 2d 395 (2d Cir. 1966) 8, 9

United States v. Bowles, 183 F. Supp. 237 (D. Me. 1958) 6

United States v. Irwin, 354 F. 2d 192 (2d Cir. 1967), cert. denied, 383 U. S. 967 (1966).....6, 8, 11

United States v. Labovitz, 251 F. 2d 393 (3rd Cir. 1958) 6

United States v. Miller, 340 F. 2d 421 (4th Cir. 1965) 11

United States v. Vasilick, 206 F. Supp. 195 (D. C. Pa. 1962)..... 5

Willis v. Hunter, 166 F. 2d 721 (C. C. A. Kan. 1948), certiorari denied, 334 U. S. 848..... 5

United States Constitution Cited

Sixth Amendment 2, 5, 6

PAGE

Statutes Cited

18 U.S.C. (Aider and Abettor Statute) 2

Sec. 2 ..... 2, 13

Sec. 201 11

Sec. 201(b) 2, 3, 6, 8, 11, 13

Sec. 201(e) 6

28 U.S.C.:

Sec. 1254 (1) 1

Text Cited

Perkins, Criminal Law and Procedure (1952):
341-349 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

JOSEPH MUSTACCHIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Joseph Mustacchio, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on December 27, 1968.

Citations to Opinions Below

There was no opinion rendered in the United States District Court for the District of New Jersey. The opinion of the United States Court of Appeals for the Third Circuit is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on December 27, 1968 (Appendix A hereto, infra, P1a).

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

Questions Presented for Review

1. Was the petitioner denied the effective assistance of Counsel in violation of Amendment Six of the United States Constitution when the trial court ordered petitioner's trial to commence immediately after petitioner secured counsel?

2. Can petitioner's conviction for bribery of a public official be sustained if the jury was not properly instructed as to the difference between a general criminal intent as opposed to a specific intent to influence the behavior of the public official?

3. Was the jury properly instructed on the applicability of the Aider and Abettor Statute 18 U.S.C. §2

Statutes Involved

The statutory provisions involved are Sections 2 and 201(b) of Title 18 U.S.C. They are printed in Appendix B, *infra,* pp. 9a-13a.

Statement of the Case

On August 11, 1967 petitioner, Joseph Mustacchio was arrested by Special Agents of the Federal Bureau of Investigation in Newark, New Jersey for bribery of a public official, namely, a Special Agent of the Federal Bureau of Investigation. Briefly, the events which led to the arrest of the petitioner for the alleged bribery are as follows:

The government's witnesses (Agents R. Lally and L. Bates) testified that defendant Restaino was arrested, on a non-connected matter, on the morning of August 10, 1967 in a suburb of Newark, New Jersey. They testified that the petitioner was present at the scene of the arrest and conversed with the Agents. Restaino was brought to the FBI office in Newark, New Jersey and several hours later,

petitioner appeared at the office. Special Agent Lally testified that petitioner gave a sum of money to defendant Restaino and then petitioner left the room at which time petitioner was arrested for bribery. There was further testimony that Restaino gave the money to Agent Lally who then arrested Restaino for bribery. An indictment was returned on August 16, 1967 charging petitioner and Gerardo Restaino with violation of 18 U.S.C. §201(b), bribery of a public official. The charges set forth constituted crimes against the United States and were therefore cognizable in the U. S. Federal District Court for the District of New Jersey where the indictments were filed.

Initially both petitioners, Joseph Mustacchio and Gerardo Restaino were represented by Peter S. Valentine, Esq., who represented them at their arraignment on August 18, 1967 (p. 14a). On September 29, 1967 when defendant Restaino formally retained Mr. Valentine, petitioner Mustacchio stated to the court his desire to obtain independent counsel (p. 15a).

The petitioner stated that after discussing the matter of dual representation with Mr. Valentine, petitioner believed it would be detrimental to his interests to have Mr. Valentine as his counsel. District Judge R. J. Wortendy agreed that petitioner's interests could be protected if there was no dual representation by Mr. Valentine and granted Mr. Valentine's motion to be relieved as counsel for petitioner (pp. 16a-21a). The trial of the matter was set down for October 10, 1967 and petitioner was directed to secure independent counsel (p. 21a).

On October 6, 1967 a hearing on retention of counsel was held before District Judge R. Shaw, petitioner appearing *pro se* (p. 22a). Mr. Mustacchio related to the court his attempts at securing an attorney to represent him. He was unable to arrange satisfactory financial matters with the attorney he desired to represent him and a second attorney

would not represent him due to the iminence of the trial, and insufficient time for preparation (p. 23a). Petitioner was directed to appear on October 10, 1967, the trial date, with an attorney (p. 24a).

On the morning of October 10, 1967, petitioner appeared together with Matthew P. Boylan, Esq., before District Judge R. Shaw (p. 25a). Mr. Boylan declared to the court that he did not represent petitioner and would not represent him if the trial were to commence that day due to the fact that he had no time to prepare any defense (pp. 25a, 28a). The court gave Mr. Boylan a ten minute recess to determine whether or not he would represent petitioner, and intimated an inclination to grant a continuance (p. 28a).

Following a short recess, Mr. Boylan represented to the court that he would definitely represent petitioner and moved for an adjournment to allow time for preparation (p. 29a). Over counsel's objection and despite repeated statements regarding lack of time to prepare, the Court directed the trial to commence immediately (pp. 29a, 30a). Indeed, the court seemed more concerned with the convenience of the jury panel as opposed to safeguarding the Sixth Amendment rights of the accused (p. 30a). Even petitioner's request to start the trial later in the day was denied (p. 29a). A jury was picked that morning, and the government began its case following the lunch recess (p. 32a). Discovery, one of the most effective tools of the defense attorney was limited to a hasty perusal of the government's file during lunch time.

With the foregoing as a background for the trial, it is not surprising that petitioner and Mr. Restaino were convicted of the crime charged.

A Notice of Motion for a new trial was filed on October 20, 1967 which motion was denied in an Order signed by

Judge Robert Shaw, on December 19, 1967. On January 5, 1968, defendant Mustacchio was sentenced to seven years imprisonment, and a Notice of Appeal from the Judgment of conviction was filed on that day. Petitioner is presently at liberty on bail.

Reasons for Granting the Writ

(a) The instant case provides another example where there has not been sufficient compliance with the directive implicitly set forth in Amendment Six of the United States Constitution.

That Amendment provides in pertinent part that an accused shall ". . . have the Assistance of Counsel for his defense."

Where defense counsel has been denied adequate opportunity to prepare his defense, the Courts have consistently held that this denial violates the Sixth Amendment and that a conviction based thereon should be reversed and a new trial granted. *Shapiro* v. *United States,* 69 F. Supp. 205 (Ct. Cl. 1947); *Everitt* v. *United States,* 281 F. 2d 429 (C. A. Fla. 1960); *United States* v. *Vasilick,* 206 F. Supp. 195 (D. C. Pa. 1962).

Defendant's counsel was afforded no opportunity to consult with the defendant in fact counsel met petitioner for the first time on the previous day, nor to adequately prepare a defense, prior to the commencement of trial except for the one hour luncheon recess. To satisfy the mandate of the Sixth Amendment with respect to the assistance of counsel, such assistance must be effective and rendered by an attorney who has been afforded ample opportunity to acquaint himself with the facts and law involved. *Mitchell* v. *United States,* 259 F. 2d 787, certiorari denied 358 U. S. 850 (1958); *Willis* v. *Hunter,* 166 F. 2d 721 (C. C. A. Kan. 1948), certiorari denied 334 U. S. 848; *Maye* v. *Pescor,* 162 F. 2d 641 (C. C. A. Mo. 1947), affirmed 214 F. 2d 860.

Throughout defendant's motion for adjournment, objections were made to the immediate commencement of the trial. Despite the objection and the obvious prejudice which would result due to the lack of an opportunity to prepare a defense, the Court insisted the trial be started immediately (pp. 25a, 28a-30a).

It is a manifest violation of the Sixth Amendment to compel a defendant to stand trial for a most serious criminal offense without the effective assistance of counsel. Upon conviction of violation 18 U.S.C. §201(b), a defendant may be fined not more than $20,000.00 or three times the monetary equivalent of the thing of value, whichever is greater or imprisoned for not more than fifteen years, or both. 18 U.S.C. §201(e). Defendant Mustacchio was sentenced to seven years imprisonment. It was a clear and absolute abuse of discretion on the part of the trial court, in view of the severe penalty which could be imposed and which was imposed and in view of counsel's inability to prepare, to deny the motion for an adjournment of one week. The entire process from arrest to conviction occurred with a period of eight weeks. Surely, one more week would not have prejudiced the government in its case and the adjournment would have accorded the defendant his Sixth Amendment protection.

The denial of the motion for adjournment resulted in the denial of effective assistance of counsel and such a denial requires that defendant, Mustacchio, be granted a new trial.

(b) The *intent* to influence is an essential element of the offense of bribery defined in 18 U.S.C. §201(b). *United States* v. *Irwin*, 354 F. 2d 192, 197 (2d Cir. 1967), cert. denied, 383 U. S. 967 (1966); *Neely* v. *United States*, 274 F. 2d 389 (9th Cir. 1960); *United States* v. *Labovitz*, 251 F. 2d 393 (3rd Cir. 1958); *United States* v. *Bowles*, 183 F. Supp. 237 (D. Me. 1958). As the Court properly pointed

out, "The burden is upon the prosecution to prove an accused guilty beyond a reasonable doubt as to every essential element of the crime charged" and "Failure of the government to establish the existence of each element of the offense . . . is fatal to the prosecution."

Because these principles are the foundation of our legal process, it is of paramount importance that the jury be given careful and clear instructions regarding the law to be applied to the facts they are to determine. Any confusion arising out of this process will eat away at the very roots of the system. The instant case exemplifies the compelling nature of the requirement. The crime charged—bribery—is committed only if there is a specific intent to influence the behavior of the purported bribee. This concept of a specific intent, as distinguished from a general criminal intent (See, Perkins, Criminal Law and Procedure 341-49 (1952)), is at best, difficult for the layman to grasp. Thus an even greater effort must be made to provide a clear understanding of the legal principles involved—an even higher degree of clarity must be sought. The internal conflicts within the instant charge on the question of intent would seem to make the necessary clarity an impossibility.

From the outset, the element of intent was merged with the act of giving money. The Court instructed the jury that there were *two* elements which the government had to prove: (1) that agent Lally was a public official engaged in the performance of official functions; and (2) that the defendant Joseph Mustacchio "gave the sum of $1,000 to Robert J. Lally, Jr., with the intent to influence and induce him . . .". Although the failure to separate intent as a third, distinct element of the offense charged might not, in other circumstances, have been prejudicial to the defendant, the confusion surrounding this element grew in the instant case and the overall effect of the charge, if

the jury could understand it at all, was to reinforce this merger. The Court instructed that:

> "The criminal act charged is one that must be done knowingly and intentionally before defendant can be found guilty."

The jury could have thus concluded that the only intent necessary was an intent to do the act, *i.e.*, an intent to give the money; whereas, the behavior prohibited by 18 U.S.C. §201(b) is a giving of money with intent to influence behavior. *United States* v. *Irwin,* supra.

The notion that the requisite intent might be found solely from the act of giving money was further fostered when the Court instructed that:

> "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done.
>
> So, unless the contrary appears from the evidence, the jurors may draw the inference that an accused intended all the consequences which one standing in like circumstances and possessing like knowledge should have reasonably expected to have resulted from any act knowingly done."

Despite its ancient vintage, see *Agnew* v. *United States,* 165 U. S. 36 (1897), " . . . utterance of the quoted platitude serves no useful purpose, since insofar as the statement has logical validity the jury would know it anyhow and, more important, it may, in some contexts, mislead the jury." *United States* v. *Barash,* 365 F. 2d 395, 402 (2d Cir. 1966) (reversing bribery conviction where the "natural and probable consequences" charge was given).

The "natural and probable consequences" approach results in an improper shift of the burden of proof from the

government to the defendant. *Mann* v. *United States*, 319 F. 2d 404, 409 (5th Cir. 1963). This conflicts with the overriding presumption of innocence with which the accused is endowed under the law. *Chappell* v. *United States*, 270 F. 2d 274 (9th Cir. 1959).

> "In a bribery case it creates a serious risk that the jury might think the government's burden of showing the requisite specific intent could be met by proof of payment alone 'unless the contrary appears from the evidence' — presumably evidence the defense would have to present." (*Barash, supra* at 403).

Defense counsel objected to the use of this instruction pointing out the inherent danger—the failure to make clear that the existence of the specific intent must be established beyond a reasonable doubt in this defendant and must not be derived merely from the payment of money. Counsel adverted to Judge Friendly's view (expressed in *United States* v. *Barash, supra*) that this charge would be better not used at all in criminal prosecutions where specific intent is involved (see also, *Mann* v. *United States, supra; Chappell* v. *United States, supra; Block* v. *United States*, 221 F. 2d 786, 788-89 (9th Cir. 1955)). An attempt was then made to fashion a remedial charge, presumably under the theory (which may in itself be questionable—*Mann* v. *United States, supra*, held the "natural and probable consequences" charge to be plain error) that the improper effect of the charge may be overcome—and reversible error avoided—where "the charge as a whole correctly stated the law with sufficient clarity as not to be misleading." (*Cohen* v. *United States*, 378 F. 2d 751 (9th Cir. 1967); *Moore* v. *United States*, 375 F. 2d 877 (8th Cir. 1967); *Imholte* v. *United States*, 226 F. 2d 585 (8th Cir. 1955)).

Assuming *arguendo* that the use of the "natural and probable consequences" charge in this context does not so cloud the already complex question for the jury as to

render the error beyond remedy, petitioner contends that the attempt to remedy the error in this case resulted in charges so confusing to the jury that his right to a fair determination based on the law was irretrievably prejudiced. At first it was suggested that the original charge be supplemented with an instruction that "independent evidence . . . of specific intent to influence" must be found from facts other than the mere payment of money. The Court accepted this proposal with its own supplement added that it was wholly within the province of the jury to determine what inferences might be drawn from the evidence. Then it was suggested that the jury might be instructed to *disregard* the original instruction and (this may have been due to misunderstanding) to replace it with the *Court's* proposed supplement. When pressed for the "proper" supplement to the retracted original charge, counsel returned to an instruction on the finding of a separate specific intent to influence.

The "remedial" instruction finally emerged as an abstract, general statement that intent must be derived from all of the evidence. The jury was instructed to disregard the original "natural and probable consequences" charge but was not specifically cautioned that the finding of intent could not be based on the mere payment of money (D62a to D64a). The fact that this path may have been left open in the jurors' minds would defeat the purpose of the would-be remedial charge. The confusion would appear heightened by the Court's additional remarks which lumped payment, intent to induce behavior, and corruption [in the payment] together. In that the finding of a payment with intent would ground a finding of a *corrupt* payment, the jurors may have felt that a finding of a *corrupt* payment was sufficient to find intent. This final confusion of the separate elements of the offense— a *corrupt* payment *and* an *intent* to influence behavior did nothing to remedy the original prejudicial charge. In fact, the error would seem

magnified. In a criminal trial, if the judge's last minute instruction is a special ruling on a vital issue and it is misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge. *Bollenbach* v. *United States,* 326 U. S. 607 (1946).

Perhaps the clearest illustration of the erroneous nature of the charge is a comparison of the language of the charge itself as it was directed to the issue of intent with the explanation of the separate elements in section 201(b) contained in *United States* v. *Irwin, supra,* at p. 197. This Court charged as follows, and it was a correct assimilation of the different elements of the crime charged in the indictment:

> "If you so find and further find that there was a payment of money to Agent Lally by a defendant, directly or indirectly, with criminal intent to induce him and other agents of the Federal Bureau of Investigation while engaged in the performance of their official duties to do or omit any act in discharge of their duties, such payment of money would be an act corruptly done." (D21a)

The subsequent explication of this charge was devoted to giving the jury standards to determine what constituted "criminal intent." The standards were confined to the classical concept of *mens rea* which is the equivelant of criminal intent. It is criminal intent which is embodied in the statutory word "corruptly." Corruptly was added to Section 201 when it was generally amended in 1962, and a comparison of the language in Section 201 after the 1962 amendment with the language of Section 201 as enacted in 1948 establishes this fact. *E.g., United States* v. *Miller,* 340 F. 2d 421 (4th Cir. 1965).

In *United States* v. *Irwin, supra,* at p. 197, the relationship between the two separate areas of intent, an intent to influence and a corrupt intent, is clearly established:

> *"The intent to influence, accompanying the corrupt giving or accepting of something of value,* is an essential element of §201(b, c, d, e) which Congress dealt with in separate subsections, and for the violation of each of which it attached severe penalties. No similar provisions concerning *corrupt giving and specific intent to influence* or induce were included in §201 (f, g, h, i), and the penalty provided for a violation of any of those subsections was much less severe." (Emphasis added).

The emphasis placed by the instruction on the standards by which the existence of criminal intent might be found was due in large part to the fact that the government never introduced proof of the specific functions or duties of the F.B.I. agents which were intended to be influenced by the payment of the money in question. In framing the charge this Court tied it to the elements of proof in the case, and since there was no proof of any specific duties of the agents which the defendants were allegedly seeking to influence, the Court of necessity was not in a position to charge that the defendants had a specific intent to influence the agents in any particular area. It was assumed throughout the case that the purpose of the payment was to obtain the release of the defendant, Restaino, from custody. For purposes of this argument, this assumption may be accepted as true. However, the failure of the agents to testify about what their duties were with respect to the defendant, Restaino, once he was in their custody left the Court no alternative but to instruct the jury that the intent to influence was an essential element of the crime but without a supporting framework which would make the charge intelligible.

The supplemental charge did not specify that the intent to influence is an element of the crime separate from the criminal intent which must animate and motivate that spe-

cific intent to influence. The jury was not adequately charged that in addition to the criminal intent present in all criminal violations, they must also find a further intent, *i.e.*, the specific intent to influence the duties of the agents. This instruction failed to convey to the jury the need to find both separate elements of the offense before it might convict the defendant, Mustacchio.

(c) Petitioner, Joseph Mustacchio, was charged with a violation of the Federal Bribery Statute, 18 U.S.C. §201 (b). This section sanctions the behavior of anyone who:

> "*directly or indirectly,* corruptly gives, offers or promises anything of value to any public official . . . with intent—
>
> (1) to influence any official act; or
>
> (2) to influence such public official . . . to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
>
> (3) to induce such public official . . . to do or omit to do any act in violation of his lawful duty . . ." (Emphasis added)

The quoted section punishes direct and indirect actions equally. Thus when the Court charged the jury that defendant, Mustacchio might be punished as a principal under the Aider and Abetter Statute (18 U. S. C. §2), that is as one who indirectly causes an act to be done which if *directly* performed by him would be an offense, the effect was cumulative and confusing to the jury. The prohibition of indirect action under the Aider and Abettor Statute may have appeared a separate and distinct offense of which defendant, Mustacchio, might be found guilty rather than the singular and same offense under Section 201(b)—the basis of the instant indictment.

Even the Court seems to have fallen prey to the confusing interplay set up by this double-barrelled attack. After discussing the possible impact of the Aider and Abettor Statute if the jury found that the defendant, Mustacchio, had given $1,000.00 to the defendant, Restaino, who in turn gave the money to agent Lally, the Court in response to the Assistant United States Attorney's question concerning the clarity of the fact that both defendants could be found guilty of giving the same $1,000.00 to agent Lally, said, "The statute reads directly or indirectly in the entire context. It would serve no purpose to add confusion to this case . . .". Defendant Mustacchio, contends that such confusion was already "added", to his prejudice.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

STEIN, BLIABLIAS & GOLDMAN
Counsel for Petitioner
by DINO D. BLIABLIAS

KENNETH J. MCGUIRE,
On the Petition.

APPENDIX A

Opinion of the Court

(Filed December 27, 1968)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17078

UNITED STATES OF AMERICA

v.

GERARDO RESTAINO,

Appellant

No. 17079

UNITED STATES OF AMERICA

v.

JOSEPH MUSTACCHIO,

Appellant.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued October 7, 1968
Before McLAUGHLIN, STALEY and VAN DUSEN,
Circuit Judges.

By STALEY, Circuit Judge.

Appellants, Joseph Mustacchio and Gerardo Restaino, were jointly tried and convicted by a jury of violating 18

U.S.C. § 201(b)[1] by bribing a public official. From their judgments of conviction these appeals followed.

Both appellants contend that the district court erred by confusing the jury with its charge on criminal intent.[2] In its initial charge, the court instructed the jury that criminal intent could be proven by circumstantial evidence and that it was permissible for the jury to draw the inference that a person ordinarily intends the natural and probable consequences of acts knowingly done. The court further charged that unless the contrary appeared from the evidence, the jury could infer that the defendant intended all the consequences which one standing in like circumstances and possessing like knowledge would have reasonably ex-

---

[1] "201(b). Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

"(1) to influence any official act; or

"(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

"(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty * * *

"Shall be fined not more than $20,000 * * * or imprisoned for not more than 15 years, or both * * *." 18 U.S.C. § 201.

[2] This contention, and the alleged support therefor, is set out in Mustacchio's brief. Restaino indicated in his brief that he adopted Mustacchio's argument on this point *in toto*.

pected to have resulted from any act knowingly done. At the close of the charge, Mustacchio's counsel objected to the "natural and probable consequences" instruction on intent, *cf. United States* v. *Barash*, 365 F. 2d 395, 402 (C. A. 2, 1966) and requested that it be qualified in certain respects. In response to this request, the court excused the jurors and instructed them not to begin their deliberations. Mustacchio's counsel was then asked to write out and submit to the court a remedial instruction that would cure any error in the initial instruction. Counsel did this, but then asked the court to withdraw his proposed corrective instruction because he apparently believed it to be inadequate. After an extended discussion, agreement was reached between Mustacchio's counsel and the court concerning the substance of the corrective instruction. The jury was then called into the courtroom and given the supplemental charge. Counsel for both defendants indicated their satisfaction with the court's revised charge.[3]

We have carefully examined the corrective instructions, and we fail to see how confusion could have emanated from the district court's patient and judicious handling of this matter. Aside from the fact that appellants' counsel did not object to and actually agreed with the supplemental instruction, the record clearly discloses that the court directed the jury to ignore its previous instruction regarding criminal intent and then proceeded to set out in detail

---

[3] After the jury retired, the court stated that "in accordance with my suggestion at the completion of my supplemental instructions each of counsel for the defendants nodded their agreement, which I take it is to the effect that they were satisfied with the remedial instructions."

The record shows that counsel for appellant Mustacchio responded, "yes, sir."

the proper criteria for determining the existence of *mens rea*. We must assume that the jury followed the court's instructions, Cook v. United States, 354 F. 2d 529 (C. A. 9, 1965), for "[t]o say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions." Opper v. United States, 348 U. S. 84, 95 (1954). There was clearly no reversible error here.

In a related contention, Mustacchio argues that the jury may have been confused by the court's charge that the Federal Aider and Abettor Statute, 18 U. S. C. §2,[4] might apply depending on how the facts were found. Here again we note that although the district court allowed ample opportunity for counsel to object to any portion of the charge, no objection was voiced concerning this instruction. In the absence of a timely objection in the district court, Mustacchio cannot raise the issue here unless he establishes that the aiding and abetting charge constituted plain error. F. R. Crim. P. 30, 52(b). See also, United States v. Casavina, 368 F. 2d 987 (C. A. 3, 1966), cert. denied, 385 U. S. 1006 (1967); United States v. Provenzano, 334 F. 2d 678, 690 (C. A. 3, 1964). This he has not attempted to do; he merely alleges that the charge could have created some confusion. Our examination of the charge convinces us that there is no basis for this contention. The court properly advised the jury of the possible application of 18 U. S. C. §2, and we can see no error—plain or otherwise. *Cf.* United States v. Provenzano, supra at 690-691.

---

[4] The Aider and Abettor Statute, 18 U.S.C. §2, punishes one as a principal who indirectly causes an act to be done which, if done directly by him, would be an offense.

Mustacchio next argues that he was denied the effective assistance of counsel because his counsel had been contacted only the day before the case came to trial and the district court abused its discretion in denying his request for a continuance to prepare the defense. In Ungar v. Sarafite, 376 U. S. 575 (1964), the Supreme Court stated:

> "The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel." 376 U. S. at 589.

It is apparent from the Court's opinion in *Ungar* that there are no mechanical tests for determining an abuse of discretion; rather, careful attention must be given to the facts of each case when deciding whether there was a due process violation. The record in the instant case discloses that three different attorneys represented Mustacchio and that a continuance was caused when the second attorney was discharged as trial became imminent.[5] The record also

---

[5] On the morning of their arrest, both appellants were represented by Mr. Querques before the United States Commissioner. Later, both men were represented by Peter Valentine at the arraignment on August 18, 1967. The case was listed for trial on September 26, 1967. On that date Mr. Valentine informed the United States Attorney that he would not represent either appellant because he had not obtained a retainer from them. A retention of counsel hearing was then scheduled for September 29, 1967, and the trial date adjourned to October 2, 1967. At the September 29 hearing, Mr. Valentine disclosed that he had been retained by Restaino but that Mustacchio did not wish

(*Footnote continued on following page*)

reveals that Mustacchio's counsel was given the Government's entire file prior to the commencement of the trial, and that Mustacchio was defended in a highly competent and professional manner.[6] As stated by the Court of Appeals for the Second Circuit in United States ex rel. Davis v. McMann, 386 F. 2d 611, 618-619 (C. A. 2, 1967), cert. denied, 390 U. S. 958 (1968):

> "* * * Though a defendant has a right to select his own counsel if he acts expeditiously to do so, Releford v. United States, 288 F. 2d 298 (C. A. 9,

---

(*Footnote continued from preceding page*)

to be represented by him. Trial was then continued until October 10, 1967, to allow Mustacchio to retain counsel. One week later, on October 6, 1967, a second retention of counsel hearing was held at which Mustacchio appeared and requested another continuance, saying that he had been unable to secure an attorney. The request was refused, and Mustacchio was told to get a lawyer by October 10, the date of the trial.

When court convened on October 10, Mustacchio appeared with attorney Matthew P. Boylan, who informed the court that he had been called in on the case on October 6 and had talked to Mustacchio briefly on October 9 but had informed appellant that he could not represent him unless a continuance was granted to allow him time to prepare the case. The trial court refused the continuance and ordered Mustacchio and attorney Boylan to discuss the matter and make a definite decision as to the representation. The decision was made that Mr. Boylan would represent Mustacchio. He then requested that trial be adjourned for another week, a request denied by the trial judge.

[6] A reading of the transcript of the trial discloses numerous objections made by counsel for Mustacchio that demonstrate his thorough understanding of the case. The objection to the court's initial instructions on criminal intent was made by Mr. Boylan and the ensuing discussion on this point with the trial judge indicates the competence on the part of counsel in this case.

> 1961), he may not use this right to play a 'cat and mouse' game with the court, Releford v. United States, 309 F. 2d 706 (C. A. 9, 1962), or by ruse or stratagem fraudulently seek to have the trial judge placed in a position where, in moving along the business of the court, the judge appears to be arbitrarily depriving the defendant of counsel. * * *"

On the facts of this case, we are unable to perceive any violation of Mustacchio's Sixth Amendment rights. *Cf.* United States v. Abbamonte, 348 F. 2d 700 (C. A. 2, 1965), cert. denied, 382 U. S. 982 (1966); Leino v. United States, 338 F. 2d 154 (C. A. 10, 1964); United States v. Bentvena, 319 F. 2d 916 (C. A. 2), cert. denied sub nom. Ormento v. United States, 375 U. S. 940 (1963), *with* United States ex rel. Mathis v. Rundle, 394 F. 2d 748 (C. A. 3, 1968).

Restaino's only argument, other than this adoption of Mustacchio's challenge to the district court's charge on criminal intent, is that the sentence imposed on him was unduly harsh and oppressive and constituted an abuse of discretion. Our study of the record discloses no abuse, and since the sentence imposed by the district court was in conformity with the statute, it is not reviewable here. Gore v. United States, 357 U. S. 386 (1958); United States v. Brown, 382 F. 2d 52 (C. A. 3, 1967); United States v. Frank, 245 F. 2d 284 (C. A. 3), cert. denied, 355 U .S. 819 (1957).

We have given due consideration to all contentions advanced by appellants; we find no merit in any of them. Accordingly, the judgments of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix A

Judgment

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17,079

UNITED STATES OF AMERICA,

vs.

GERARDO RESTAINO and JOSEPH MUSTACCHIO,
JOSEPH MUSTACCHIO,

Appellant.

(D. C. Criminal No. 342-67)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present:

McLAUGHLIN, STALEY and VAN DUSEN,
Circuit Judge.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed January 5, 1968, be, and the same is hereby affirmed.

ATTEST:

M. ELIZABETH FERGUSON
Chief Deputy Clerk

December 27, 1968

APPENDIX B

Statutory Provisions Cited

18 U.S.C. §2:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.

18 U.S.C. §201:

(a) For the purpose of this section:

"public official" means Member of Congress, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; and

"person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and

"official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

Appendix B

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty, or

(c) Whoever being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty; or

(d) Whoever, directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom; or

(e) Whoever, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity in return for being influenced in his testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom—

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of

official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; or

(h) Whoever, directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of his absence therefrom; or

(i) Whoever, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of the testimony under oath or affirmation given or to be given by him as a witness upon any such trial, hearing, or other proceeding, or for or because of his absence therefrom—

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

(j) Subsections (d), (e), (h), and (i) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or, in the case of expert witnesses, involving a technical or professional opinion, a reasonable fee for time spent in the

preparation of such opinion, and in appearing and testifying.

(k) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title. Added Pub. L. 87-849, § 1(a), Oct. 23, 1962, 76 Stat. 1119.

APPENDIX C

TRANSCRIPT

Newark, New Jersey,
September 29, 1967,

Before:

HONORABLE REYNIER J. WORTENDYKE, JR.,
U. S. D. J.

Appearances:

UNITED STATES ATTORNEY, Attorney for the Government, By: GEORGE KOELZER, Esq.

PETER S. VALENTINE, Esq., Attorney for the Defendant.

---

(2) Mr. Valentine: My name is Valentine, your Honor. I represented these defendants at the arraignment last month, and, as your Honor may know, this matter is scheduled for trial on Monday.

The Court: Next Monday, this coming Monday?

Mr. Valentine: Yes. Mr. Restaino has indicated the desire that I represent him. He has retained me to represent him at the trial of this matter. Mr. Mustacchio, your Honor, has expressed a desire that he obtain other counsel. It is for this reason that we are before the Court this morning. I might add that Mr. Mustacchio, I explained to him about the assignment system here, but he indicated he can afford to retain counsel and the purpose of this motion today is to enable Mr. Mustacchio to obtain counsel.

As I indicated, the matter is on the list for Monday.

Mr. Koelzer: Number two on the trial list tomorrow and we have every expectation that it will be tried this coming week, one of the next cases out for trial.

Appendix C

The Court: Which is Mr. Restaino? You say, Mr. Valentine, that you represent Mr. Mustacchio?

Mr. Valentine: No, Mr. Restaino has engaged me (3) to represent him at the trial of this trial. There is no application pending with respect to him.

The Court: So the only application presently being made is for your relief from representation of Mr. Mustacchio .

Mr. Valentine: Well, he expressed a desire that he does not want me to represent him at the trial. What do you say?

The Defendant: That's correct, your Honor.

Mr. Valentine: Whom do you want to represent you?

The Defendant: I haven't decided as yet who I am going to select for a lawyer.

Mr. Koelzer. May I be heard briefly?

The Court: Just a minute; I'll give you all a chance. It's pretty late to make up your mind.

The Defendant: I was only notified on Tuesday that this matter was coming forth. I had no idea.

The Court: When was the indictment returned?

Mr. Koelzer: August 16th, I believe.

Mr. Valentine: Last month, your Honor.

The Court: You have known that you were indicted since August, isn't that right?

The Defendant: Yes, sir.

The Court: And you pleaded not guilty through (4) Mr. Valentine, at that time?

The Defendant: That's right.

The Court: When did you make up your mind you didn't want Mr. Valentine?

The Defendant: On Tuesday.

The Court: Last Tuesday?

The Defendant: This Tuesday, your Honor.

The Court: You mean Tuesday of the week that has just expired?

Well, did you determine upon the identity of the person whom you desired to retain when you notified Mr. Valentine you didn't want him?

The Defendant: No, sir. It wasn't until after talking with Mr. Valentine on Tuesday that I came to this decision. I don't think it would be advisable for me to be represented by Mr. Valentine. I think it would be detrimental to my interests in the case to have an attorney also represented by the co-defendant.

The Court: You may have something there; I don't know. Let me see the indictment.

It charges the defendants jointly with having corruptly given the sum of a thousand dollars to a person by the name of Robert J. Lally, Jr., an employee of the United States, acting in the Department of the (5) Federal Bureau of Investigation. Now, do you feel, Mr. Mustacchio, that to stand trial with Mr. Restaino your rights might be impaired?

The Defendant: I don't understand that, your Honor.

The Court: The two of you are charged with having jointly given a thousand dollars to Lally, an FBI man. You understand that?

The Defendant: Yes.

The Court: In what respects are you concerned lest your personal rights may be impaired if you stand trial with the same attorney?

The Defendant: I don't think Mr. Valentine could represent me properly if he has another defendant in the case. He couldn't devote the proper time to me during the trial.

The Court: Well, that is a possibility and, of course, the Court recognizes that such a possibility might ad-

versely affect this defendant. Therefore, I am inclined to accede to Mr. Valentine's request that he be relieved from representation of Mr. Mustacchio. I think Mr. Mustacchio should have a reasonable opportunity to retain other counsel.

Mr. Koelzer: May I be heard on this point briefly? This case, while not old, is being moved at this time (6) for several reasons, among them being that the charge is probably the most serious crime envisioned. These men bribed or attempted to bribe an FBI agent. Now, Mr. Valentine is the second attorney in this case. Mr. Mustacchio originally had Mr. Querques. He had him and then he switched to Mr. Valentine. When trial comes close, he gets a third attorney, and quite frankly, we are quite interested in moving this case for trial because of the nature of the charge. We would strenuously object to any adjournment beyond that for that reason.

I say this: I would offer to cooperate in any way possible at any time over this weekend coming up with any new counsel retained in this matter to the end that that case be moved for trial next week.

The Court: I, as one of the Judges assigned to the trial of criminal cases, am actually on trial in a case that commenced yesterday which will continue on Monday. I don't know what will be the next case on my calendar, nor do I know what may be the next case on Judge Shaw's calendar, who is also assigned to the trial of criminal cases.

Mr. Koelzer: My understanding is this will be the next case before you, so I am told.

Mr. Valentine: Your Honor, I might say this: (7) If your Honor is presently in the midst of a trial, I will not be able to work a full week myself next week because of the holidays. We might, for that reason alone, not be able to go to trial next week.

Appendix C

The Court: I don't know of any information before me. There is someone who knows more about the holidays than I do. Mr. Shwitzer, what do you know about that?

Mr. Shwitzer: Thursday and Friday of next week are the Rosh Hashonah Holidays. Yom Kippur comes on a Saturday and there is no problem.

The Court: So Thursday and Friday are out.

Mr. Shwitzer: They are holidays.

The Court: They are out as far as trials.

Mr. Shwitzer: Yes.

The Court: I don't know how much longer the case on trial before me will take, but it won't take long.

Mr. Koelzer: I might point out the Government's testimony in this case will run approximately one to two hours.

The Court: Then you will be at liberty up until Wednesday night, won't you?

Mr. Valentine: That's right.

The Court: And that we will recess before sundown. I'll see to that, if I am around. Any reason why you (8) can't go to trial following the one for the case that is on trial.

Mr. Valentine: Your Honor, as I indicated, I represent Mr. Restaino, and the problem is not mine with him. It is with Mr. Mustacchio at this point.

The Court: I know that, but I am concerned about your remainder about the holidays.

Mr. Valentine: If your Honor's case finishes in the early part of the week, there will be no problem as far as that is concerned.

The Court: Let us solve this thing. You live at 46 North Sixth Street, Mr. Mustacchio?

Do you propose to get a lawyer from the City of Newark or are you going elsewhere in the State?

The Defendant: I'll probably get a lawyer from Newark.

The Court: No idea whom you want to retain?

The Defendant: I haven't solicited anyone as yet.

The Court: I will tell you what we will do. There will be no cases tried tomorrow or Sunday, at least not as far as I am concerned. I'll be finishing a case on Monday. Unless something unforseen happens, I am not going to prevent this defendant from retaining counsel under the circumstances, although it seems to me rather strange he didn't (9) receive Mr. Querques.

Mr. Koelzer: In view of the background, this is the second attorney in a short life in this case, and I am sure the reason for this action now is to avoid trial next week. I wish to avoid that on their part. I intend to move this case for trial.

Mr. Valentine: I think I should set the record straight.

Mr. Koelzer: One moment. Just one second. I might point out that Mr. Valentine told me Tuesday morning, I believe it was, about this, and he's had at least since Tuesday by his own admission to hire another lawyer. And here it is Friday. I venture to say he won't by Monday.

Mr. Valentine: I would like to set the record straight. Mr. Mustacchio can correct me. I don't believe that Mr. Querques was retained in this matter. I believe these gentlemen were incarcerated sometime in the middle of the night, and for the purpose of being released on bail, Mr. Querques was called in for the matter. It was not—I don't believe that at the request of these people, but a friend of those who tried to contact a lawyer for the purpose of getting their freedom on bail.

Am I correct?

(10) The Defendant: That's correct. I did not retain Mr. Querques. He represented me at the Commissioner's office for the purpose of bail.

Mr. Koelzer: I might point out that Commissioner Kiscaris's report to us showed us that Mr. Querques was retained by Mr. Mustacchio.

The Court: I can't halp that. I am going to see to it that both of these defendants get a fair trial. But I am not going to tolerate any intentional delay in the trial of the case beyond a reason that is reasonably appropriate for the retention of counsel.

Have you ever been represented by any other attorney, Mr. Mustacchio?

The Defendant: Yes, sir.

The Court: Any reason why you can't retain him?

The Defendant: No, sir, except that I haven't been able to have an appointment with him. I intend to solicit an attorney in Newark.

The Court: New York?

The Defendant: Newark.

The Court: What is his name?

The Witness: Angelo Bianci.

The Court: Well, he is not difficult to contact.

The Defendant: No, sir.

The Court: You see, I don't like to say that this (11) case will have to go to trial on Tuesday lest we find that it will take longer than Wednesday or Tuesday, and Wednesday, in view of the imminence of the Jewish holidays, to carry the trial over to the beginning of next week. All right, I will tell you what I will do—

Mr. Valentine: I was going to make one final point.

The Court: What is it?

Mr. Valentine: I think we are going to be involved with client problems no matter what happens. Mr. Mustacchio's situation or perhaps with mine next week. Would your Honor consider a short time lapse to enable Mr. Mustacchio to engage someone and also to perhaps avoid any possible conflict that I might have next week?

The Court: That is what I am considering. The trouble is a week from Monday is motion day.

Appendix C

Mr. Koelzer: I might point out something else, although it is not terribly consequential: It is a consideration to us out of courtesy to our co-workers, the principal witness in this case, the agent upstairs, is being transferred as of a week from today, and we might run into difficulty if he is moving. That is one of the reasons I intended to move it next week. (12) I know it is not determinative, but a matter of courtesy to a co-worker. I would like to help him.

The Court: I did not create the situation which presently confronts us. I am inclined to give Mr. Mustacchio one week and no more within which to retain counsel. I cannot, therefore, carry the case until the 9th, but it can be carried until the 10th.

Mr. Koelzer: I point out, for what it is worth, Mr. Mustacchio had all this week.

The Court: That may very well be, but I don't want him bouncing back by letter or otherwise in the event there should be a conviction charging that he is entitled to a writ of habeas corpus because he wasn't given a reasonable opportunity to be represented by counsel.

I don't make these rules; they make them in Washington. I don't have anything to say about them. So that will be the order here: This case, until the 10th, and as soon as you retain counsel, notify the Government as to his identity, name and address, and don't delay. You are relieved from representation of Mr. Mustacchio.

Appendix C

(1) HEARING ON RETENTION OF COUNSEL
Newark, New Jersey,

October 6, 1967.

Before: THE HONORABLE ROBERT SHAW, U. S. D. J.

Appearances:

United States Attorney, by: *George J. Koelzer*, Esq., Assistant U. S. Attorney, for the Government.

JOSEPH MUSTACCHIO, pro se.

---

(2) Mr. Koelzer: This defendant was indicted for attempted bribery of two FBI agents, and it was listed for trial last Monday, October 2nd, and various attorneys had appeared. First Mr. Querques appeared for these two defendants at the Commissioner's hearing, and then an attorney by the name of Peter Valentine appeared for both defendants, and earlier last week Mr. Valentine advised me he did not represent these two defendants.

Last Friday, we brought the defendant in with Mr. Valentine, and since then it was our understanding that Mr. Valentine represented a co-defendant, but that Mr. Mustacchio over the weekend would obtain an attorney; and Judge Wortendyke set the matter down for trial peremptorily on October 10th, which is next Tuesday. I thereafter—since it was listed for trial this coming Tuesday, I was advised by Mr. Horowitz to list it again as to Mr. Mustacchio for a retention of counsel hearing on this for this Friday with the notation that if he had an attorney he would contact me and we would put it off.

The Court: Mr. Mustacchio, do you have counsel?

Mr. Mustacchio: I would like to offer an explanation.

The Court: All right. Go ahead.

Mr. Mustacchio: Last Friday when I appeared for (3) retention of counsel here I was given until the 10th of October to procure counsel. I contacted the office of Mr. Querques and I arranged an appointment with him for yesterday. At this time Mr. Querques and I discussed whether or not he would be able to accept my case. He said he would take the case, and he established his fee. I offered him forty percent of the fee as a retainer and the balance to be paid as we go along. He said ordinarily this would be satisfactory to him. However, since the case is so imminent he doesn't think there would be sufficient time for me to pay the balance of the fee, and therefore, unless I pay the entire fee he would not represent me.

Afterwards I contacted another attorney and asked whether or not he would accept the case, and he advised me that he is too busy to take this case on so short a notice.

I was aware that I had been indicted and was coming to trial at the time that Mr. Valentine and I discussed it. I asked him when he thought I would go to trial. He said that I wasn't scheduled on the current calendar. There were approximately 200 cases before mine, and I probably would go in the early part of next year.

It wasn't until last Friday that I was aware the (4) case was set down for October 2nd.

I would request the Court to allow me enough time so I can earn enough money to pay Mr. Querques to represent me in this action.

The Court: We can't work out arrangements on the calendar consistent with some installment arrangement that you have with counsel.

Mr. Koelzer: First, Mr. Mustacchio has known about this case being moved on the 2nd of October for about two weeks prior to that. Secondly, Mr. Querques appeared for

this man when he was arrested. Then he was out of the case. Then Mr. Valentine. Now Mr. Querques seems to be back.

The Court: We are not going to get anywhere with further talking here.

Mr. Mustacchio, the matter is set down for trial on October 10th. You get out and get a lawyer. If you are not prepared to go to trial on the 10th and the matter comes before me I then am going to take some action with respect to your bond. Now, you get moving.

Mr. Koelzer: I might point out, your Honor, that this case is the No. 1 case Tuesday morning, to the best of my knowledge. We are prepared and expect to move it at 10:00 o'clock Tuesday morning for trial.

The Court: All right. Get moving.

Mr. Mustacchio: All right, your Honor, I will make every effort to secure counsel.

Appendix C

(1) PRETRIAL MOTION.
Newark, New Jersey,

October 10, 1967.

Before: THE HONORABLE ROBERT SHAW, U.S.D.J.

Appearances:

United States Attorney, By: *George J. Koelzer, Esq.*, Assistant United States Attorney, for the Government.

Peter S. Valentine, Esq., Attorney for defendant Restaino.

Matthew P. Boylan, Esq., Attorney for defendant Mustacchio.

---

(2) Mr. Boylan: If your Honor pleases, in Criminal No. 342-67, I am appearing today with respect to Joseph Mustacchio, a named defendant in that indictment.

I have been asked to represent him in his defense of this indictment. On Friday I was called in and I saw him on Monday, yesterday, for a short period of time. I told Mr. Mustacchio that I would be willing to represent him in this matter, but I could not represent him, if the trial of the case was, as I am told, scheduled for today, for the simple reason that I have not had sufficient time, although a great deal of time may not be necessary in view of the nature of the charge, to become familiar with the facts and circumstances of the case.

As a result your Honor, I appear here today without accepting the representation of Mr. Mustacchio to

request the Court for an adjournment of some period of time, preferably at least two weeks, in order to be able to represent him in this matter properly.

The Court: Do you represent the defendant Gerardo Restaino?

Mr. Boylan: No, your Honor, Mr. Valentine who is at counsel table, appears on his behalf.

Mr. Koelzer: Before there is any ruling of the Court I would like to be heard briefly on this.

(3) First, your Honor, you may see from the indictment and the nature of this case that we view it as perhaps as serious a case as we would find. Secondly, this case was originally posted on the September 26th list. On that date Mr. Valentine, who at that point represented both defendants, came to my office and told me—

The Court: What date?

Mr. Koelzer: September 26th.

And I might mention, your Honor, that Mr. Valentine is the second attorney in this case. On the morning that they were arrested Mr. Querques represented them. They then went to Mr. Valentine.

When it appeared that the matter was ready for trial, listed for trial, Mr. Valentine came to me and said he was not going to represent either defendant because he had not obtained a retainer from them.

We listed it for retention of counsel hearing on September 29th before Judge Wortendyke. At that time—and I might add that the trial was then adjourned to October 2nd.

On September 29th both defendants appeared before Judge Wortendyke together with Mr. Valentine. At that point Mr. Valentine said he had been retained by Mr. Restaino. Mr. Mustacchio told the Court that in view of Mr. Valentine representing Mr. Mustacchio he desired time to obtain his own attorney.

(4) The Court: Before you go any further, was this case called before Judge Wortendyke this morning?

Mr. Koelzer: Yes, your Honor, and sent over to you.

The Court: Were you present?

Mr. Restaino: No.

The Court: Well, I'll have to tell you to make your application to Judge Wortendyke because he is the assignment Judge on this calendar, and when a case is sent here I take the case. Any adjournment will have to be obtained from Judge Wortendyke.

Mr. Koelzer: I might mention the reason that it was sent over to you, although Mr. Horowitz is supposed to handle the call, is that Mr. Mustacchio was before you last Friday, and you ordered him to appear this morning with an attorney prepared to try the case, and I believe this is why the case is before you this morning, pursuant to your Honor's order last Friday morning.

Mr. Boylan: I will apply to Judge Wortendyke, if your Honor pleases, if that is the direction of the Court with respect to this matter.

Mr. Koelzer: I only point that out for this reason, it was pretty obvious right along that for the past three weeks what Mr. Mustacchio is going to do—and I believe it was obvious to the Court last Friday and I believe that (5) is the reason for the Court's order that Mr. Mustacchio appear this morning with an attorney prepared to try this case—

The Court: Mr. Boylan, have you accepted the representation of Mr. Mustacchio because I would not wish to be in the position, your Honor, of accepting it, and I would be obligated—

The Court: You leave me in rather a peculiar position. If I grant your adjournment motion you may decide you won't represent him, and in the history of this

case it is going to drag on indefinitely as he keeps soliciting other counsel.

Mr. Boylan: I can say this, your Honor, I can say this, Mr. Mustacchio is prepared to retain me to represent him in this case. I refuse to accept it because I do not completely understand the circumstances of the need for this immediate trial, since the indictment was returned in August, and as I said before, before I go any further in this matter I will speak to Mr. Koelzer, which I did.

The Court: You take ten minutes out to speak to him and I'll give you an opportunity to speak to Mr. Mustacchio and come back to me with a definite statement as to whether you are going to represent him or not, and (6) I might say this with reference to the $2,500 last Friday, with reference to revoking his bond—in the surety—and I believe you made some reference to that light of the history of this, if he is not prepared to go ahead today, I am inclined to give consideration to its continuance, so take some time out and discuss it, but I'm not going to permit Mr. Mustacchio to wait until the matter is listed for trial and then come around and say that he is changing attorneys.

Mr. Koelzer: I might say that Mr. Boylan, with all due respect, is the fourth attorney in the case. Mr. Guerques was in it twice, according to Mr. Mustacchio.

The Court: I cannot think of anyone more able—

Mr. Koelzer: I agree.

The Court: —than Mr. Boylan, and this is a very simple case. I can't conceive of any particular complications in it, and it doesn't seem to me to take any extended period of time to make the decision. Either you want to represent him or you don't.

Mr. Koelzer: I would go so far as to make the offer

to Mr. Boylan to be willing to assist him in any way as to the availability of our file.

The Court: I am sure he doesn't want or need your assistance.

(Recess.)

(7) The Court: Has counsel reached a decision?

Mr. Boylan: I have agreed to represent Mr. Mustacchio in Criminal No. 342-67, and I have an appearance to file with the Court and I request an adjournment of the trial to a date suitable to myself, subject to the convenience of the Court and the government, which would be next Tuesday.

Mr. Koelzer: I believe the government has another case planned to be moved at that time. The government is prepared on this case, as I mentioned before.

The Court: Do you have any commitments today?

Mr. Boylan: Do I have any commitments today?

The Court: Yes.

Mr. Boylan: No.

The Court: I am sure it will go very, very quickly, and, of course, if you are here, as you know, that relieves you of other commitments.

Mr. Boylan: Yes. I appreciate that, your Honor. Let's start the case at 2:00 o'clock, if we may.

The Court: We will draw a jury now and I will give you a little time later. I suspect that you will have some further discussions—that you want some further discussions with Mr. Mustacchio.

Mr. Boylan: Yes. I have no—

(8) The Court: I am not sure it goes to the matter of evidence, but I'm not going to probe into your reasons, but we will draw the jury now, and certainly from the indictment you are sufficiently apprized of what the necessary information is for the purpose of requesting

the Court to supplement its inquiry on voir dire, if you feel it necessary.

Mr. Boylan: I would say for the record, your Honor, that I think moving the case with this speed tends, and may actually—although I am not sure at this time—prejudice the defendant in his defense.

The Court: In what way?

Mr. Boylan: Because of the necessity to ascertain the relevant information on which to make the various decisions which would necessarily have to be made.

The Court: What does that have to do with choosing a jury?

Mr. Boylan: It has very little to do with choosing a jury.

The Court: All right. Bring the panel in.

Mr. Valentine: May I ask your Honor this, your Honor indicates that you wish us to pick a jury at this time. May I ask your Honor what your intentions are as far the starting of the case?

The Court: I will take that up after we choose (9) the jury, but Mr. Healey has a very substantial panel sitting over in the jury assembly room waiting. I am not inclined to have those people sit through half the day when we may never use them today. It is essential that I as well as Judge Wortendyke choose jurors as early in the day as possible and excuse the other jurors to go home. It is most unfair to the jurors to bring them down here at 10:00 o'clock and then keep them through most of the day when they may never serve on the panel.

Mr. Boylan: That may be true, your Honor, but I don't think in weighing the convenience of the jury as opposed to that of the defendants that that sacrificing of convenience of the jury ought to outweigh the convenience of the defendants.

Appendix C

The Court: You just told me you would be under no particular handicap in choosing a jury. What is your problem?

Mr. Valentine: My problem is if the jury is selected today and you have not indicated when the case will continue if a jury is picked I don't think that we can start the case today.

The Court: I do.

Mr. Valentine: I mean other than picking the jury I don't think we can go any further because of (10) what has happened in the last two weeks.

The Court: What has happened?

Mr. Valentine: The problem of one of the defendants in obtaining counsel to represent him.

Thet Court: That is not unfair—

Mr. Valentine: Yes, it is, in part, your Honor.

The Court: Why?

Mr. Valentine: Because his inability to have counsel in this case has prejudiced me to some extent in that I have not had a chance to prepare this case with co-counsel.

The Court: He has counsel and I will give you a chance to confer briefly together if there is anything in the way of coordinating activity, but, frankly, I can't imagine it, and I have had a little experience in these cases, but, nevertheless, if you have a doubt—if you need time to confer with counsel you will have it, but I don't see any reason why we should not start the case at all.

Mr. Valentine: I think your Honor is balancing the interests to the detriment of the defendants.

The Court: No. It is more than that. In this particular case we have had—I understand we have had more request after another for adjournments, and it has always been a matter, as far as Mr. Mustacchio (11) is concerned, of changing counsel.

Appendix C

Now, you didn't conceive of any difficulties, apparently, until you latched on to Mr. Boylan's position. You came here ready to try this case.

Mr. Valentine: I never made that statement in open Court, your Honor.

The Court: No. I made it. Didn't you come here prepared to try this case?

Mr. Valentine: No, I did not, for the reason I just stated.

The Court: Did you make application to Judge Wortendyke?

Mr. Valentine: Your Honor, there was a hearing last Friday, as I understand it, and I asked Mr. Koelzer this morning, "Did I get notice of that hearing?" and he indicated that I did not, and I didn't know of this hearing. I didn't know what your Honor ruled last Friday. I didn't know about it until yesterday.

Mr. Koelzer: May I say, Mr. Valentine was here on the hearing on the previous Friday, and up until that Friday, Mr. Valentine represented both defendants and he heard Judge Wortendyke set this down peremptorily for October 10th.

The Court: There is not going to be any more delay.

(12) Mr. Valentine: Your Honor, I have an 11:30 engagement in the Domestic Relations Court. Could I make a phone call or could someone else make a phone call in my behalf?

The Court: Have someone make it in your behalf and advise the Domestic Relations Court Judge that you are going to choose a jury and I have directed that you remain.

The Clerk will draw a jury in the case of the United States of America v. Gerardo Restaino and Joseph Mustacchio.

(Jury drawn.)

LIBRARY
SUPREME COURT, U. S.

JAN 24 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 973

GERARDO RESTAINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

GLICKMAN & VALENTINE
Counsel for Petitioner
11 Commerce Street
Newark, New Jersey 07102

PETER S. VALENTINE
On the Petition

TABLE OF CONTENTS

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented for Review	2
Statement of the Case	2
REASONS FOR GRANTING THE WRIT:	
I—The trial court erred in its instructions to the jury concerning the essential element of a specific intent—the resulting attempts to cure this error produced such confusion as to absolutely prevent a fair jury determination	3
II—The sentence imposed by the trial court was unduly harsh and oppressive and constituted an abuse of discretion	3
Conclusion	5
APPENDIX	
Sentences and Applications for Bail	1a
Opinion of Court of Appeals	7a
Judgment of Court of Appeals	14a

Cases Cited

State v. Johnson, 67 N. J. Super. 414, 170 A.2d 830 (App. Div. 1961)	4
State v. Juliano, 52 N.J. 232, 245 A.2d 17 (1968)	4
United States v. Wiley, 278 F.2d 500 (7th Cir. 1960)	4

Texts Cited

Brewster, Appellate Review of Sentences, 40 FRD 79	4
Rubin, Disparity and Equality of Sentences, 40 FRD 55	4

IN THE

Supreme Court of the United States

October Term, 1968

No.

GERARDO RESTAINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Gerardo Restaino, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on December 27, 1968.

Citations to Opinions Below

There was no opinion rendered in the United States District Court for the District of New Jersey. The opinion of the United States Court of Appeals for the Third Circuit is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on December 27, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Questions Presented for Review

1. Can petitioner's conviction for bribery of a public official be sustained if the jury was not properly instructed as to the difference between a general criminal intent as opposed to a specific intent to influence the behavior of the public official?

2. Does not an Appellate Court have a right to review a sentence even though the sentence imposed is within the limits prescribed by law.

The statutory provision involved is Section 201(b) of Title 18 U.S.C. It is printed in Appendix B of the Petition for Writ of Certiorari filed by the co-defendant Joseph Mustacchio.

Statement of the Case

Petitioner, Gerardo Restaino, appeals from a conviction in the United States District Court, and affirmed by the United States Court of Appeals, wherein he was found guilty following a jury trial of the crime of bribery of a public official in violation of 18 U.S.C. § 201(b). Petitioner was sentenced to 5 years in jail. Petitioner is presently on bail.

As the arguments on this Petition are directed to the charge of the trial court, as well as the sentence imposed by that court, a review of the trial testimony will not be undertaken.

REASONS FOR GRANTING THE WRIT

I

The trial court erred in its instructions to the jury concerning the essential element of a specific intent—the resulting attempts to cure this error produced such confusion as to absolutely prevent a fair jury determination.

Petitioner, in support of his position hereunder, refers to Argument (b), set forth on pages 6 to 13, of the petition of the co-defendant Joseph Mustacchio and incorporates herein in its entirety the argument therein set forth. Reference is made to that portion of the trial court's charge wherein reference is made to the defendant Restaino with respect to the element of intent. The trial court's instruction, and subsequent remedial instruction, respecting the element of intent was identical as to both defendants. Accordingly, and for the reasons set forth in the co-defendant's petition, it is submitted the the trial court's instructions constituted reversible error.

II

The sentence imposed by the trial court was unduly harsh and oppressive and constituted an abuse of discretion.

As heretofore noted, petitioner Restaino was sentenced to a term of 5 years. An examination of the transcript on the date of sentencing shows that the trial court conceded that this petitioner "played a lesser role" in the crime charged. The court, however, stated that it considered the offense in question to be a great threat to society. As stated by the court:

> "I cannot think of any greater threat to law enforcement than the bribery of public officials."

It is submitted that in the context of the instant case the afore-quoted statement of the trial court is unwarranted. While recognizing that the court could have imposed a sentence up to 15 years, the imposition of a 5 year sentence to a young man who has never been imprisoned before is harsh and oppressive under the circumstances.

In seeking to have this Court review the sentence imposed this writer is mindful of the division of opinion on the issue of appellate review of sentences. See *Rubin, Disparity and Equality of Sentences,* 40 FRD 55 and *Brewster, Appellate Review of Sentences,* 40 FRD 79. It is submitted that the better practice is to permit appellate review where it is warranted. In *United States* v. *Wiley,* 278 F. 2d 500 (7th Cir. 1960), the court stated:

> "Only in an exceptional case will this court interfere with the discretion exercised by a district court in imposing a sentence upon a defendant in a criminal case. * * * In so doing it is exercising its supervisory control of the district court, in aid of its appellate jurisdiction. This control is necessary to proper administration in the federal system." Supra at p. 503.

See also, *State* v. *Johnson,* 67 N.J. Super. 414, 170 A.2d 830 (App. Div. 1961); *State* v. *Juliano,* 52 N.J. 232, 245 A.2d 17 (1968). The Appellate Court herein held that the sentence was not reviewable. It is respectfully suggested that a better practice would permit a review.

It is submitted that the sentence imposed herein was harsh and oppressive and thus constituted an abuse of discretion.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted

GLICKMAN & VALENTINE
Counsel for Petitioner

By PETER S. VALENTINE

PETER S. VALENTINE
on the Petition

APPENDIX

Sentences and Applications for Bail

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Crim. No. 342-67

UNITED STATES OF AMERICA

v.

GERARD RESTAINO and JOSEPH MUSTACCHIO,
Defendants.

Newark, New Jersey,
January 5, 1968

Before:
THE HONORABLE ROBERT SHAW, *U.S.D.J.*

Appearances:

UNITED STATES ATTORNEY, by GEORGE J. KOELZER, Esq., Assistant United States Attorney, for the Government.

PETER S. VALENTINE, Esq., Attorney for defendant Restaino.

MATTHEW P. BOYLAND, Esq., Attorney for defendant Mustacchio.

Sentences and Applications for Bail

Mr. Koelzer: In the matter of Gerard Restaino and Joseph Mustacchio, on October 17th, 1967, a jury in this Court found the defendants guilty of the charge of bribery, and they appear before the Court with their respective attorneys for the purpose of sentencing.

Mr. Valentine: Your Honor, may it please the Court, I know your Honor is familiar with the facts in this case. The trial took about four or five days and it was tried quite recently. Now, I know your Honor also has before him, I am sure, a probation report which is complete in form, and I am sure that report will show that Mr. Restaino's past is good one as far as his ability to comply with the standards of law enforcement and order. I think the one blemish in his record deals with a Newark municipal offense which took place sometime ago, but other than that fact, Mr. Restaino has been able to and has lived a good life as a civilian, your Honor.

The Court: Let me stop you there for a moment, because I don't want to base the decision on any information that may be inaccurate. I, of course, will not consider a juvenile offense which is listed. That I will not consider, but I have his adult record, January 4tb, 1961, conviction of larceny of a grocery store. I have 1962, an assault and battery conviction. Those are two I have, and then, of course, I understand—I don't know whether it is correct—there is a pending indictment for possession of goods stolen from interstate shipment. That will not be pertinent, however. There is a presumption of innocence until found guilty. That will not be given consideration.

Mr. Koelzer: May I be heard for one moment? There is a complaint and warrant outstanding. There has not yet been an indictment returned until the conclusion of this case, but there is a charge pending of theft from intertate shipment.

The Court: I will accept that correction.

Now, as to the other offenses.

Mr. Valentine: There is no indictment, your Honor.

The Court: What about the other two?

Mr. Valentine: The offense I had reference to is that grocery store. He told me the other one had been dismissed.

The Court: On the record here I have "Found guilty. Given credit for time spent." Apparently time spent while in jail, that is as I read it.

Mr. Valentine: Is that also in the Municipal Court?

The Court: That is not indicated.

Mr. Valentine: He indicates he has never been in jail.

Defendant Restaino: On the grocery store thing, I was just locked up overnight.

The Court: All right.

Mr. Valentine: When I had reference to one offense it was the grocery store offense that he indicated to me, and that I had indicated to the Court was disposed of in the Newark Municipal Court.

Now, your Honor I am sure knows the age of the young man and your Honor also knows his family background. He is presently and he has been for a short period of time separated from his wife. He has been living with his mother and brother, and he is attempting to effect a reconciliation with his wife.

He has advised me that at no time has she ever charged him with non-support, that he has fulfilled his obligations with respect to the support of his wife, although he has in fact been separated from her.

Now the type of a situation that we have before the Court at this time, for which there is a statute that the Grand Jury has indicated Mr. Restaino violated, and the jury found him guilty of, I would like to direct your Honor's attention to his role as far as the facts in this case indicated with respect to that particular charge. I don't want to go through the whole trial because I know your Honor is familiar with the facts, although there have

been other things before your Honor since October, I am sure, but his role, your Honor—and he was picked up for having these liquor cases in his trunk. He was not the one—he is not charged with being the person who made any effort. He was there when certain conversations took place between the FBI and other individuals. He was standing there. He did not actively encourage any conversations. He stood there, so perhaps from his silence he was guilty, and furthermore when all the events took place leading up to the arrest in this building later on in the morning of that day, during the hours that he was in custody here, again his guilt is in silence. He didn't go out. He didn't obtain money, so I ask your Honor to consider his role in this case.

I also ask your Honor to consider whether this man is any threat to society because of the type of offense that has been charged here. Does he represent a danger to any citizens because of the type of crime he is charged with and convicted of in this case?

These facts, your Honor, his youth, his past record—and as I indicated there is one blemish on that record. I ask your Honor, because of all these factors—I know there are times that the Attorney General has said this is the most serious crime, but I ask your Honor to be lenient, to consider his role in this whole matter, and I ask your Honor to consider what threat he poses to society.

I ask your Honor to be lenient on the sentence.

The Court: Of course, Mr. Restaino will have a chance to talk for himself, but I think in fairness I should bring to your attention some aspects of the matter I am considering, and you can bring out the answer to the extent that Mr. Restaino can answer it.

The record I have before me indicates that he has not been gainfully employed since March of 1967. I consider that another aspect of irresponsibility together with the marital situation. Do you have any comment on that?

Mr. Valentine: I am aware of that fact, your Honor, and Mr. Restaino has frankly and candidly advised the probation department of that situation. He did not try to hide that fact. He has been trying to get employment in a certain area and he has not been able to do so.

The Court: The information I have also is that he applied for unemployment insurance benefits and after receiving the benefits for four weeks his claim was dismissed on the basis that he failed to seek employment; is that correct?

Defendant Restaino: I was seeking employment, but they said I was not looking hard enough, and I could have appealed it, but I didn't, the dismissal of unemployment benefits.

The Court: Have you anything else to bring up?

Mr. Valentine: No, except he advises me he sought employment in a certain area and he has not been able to get that.

The Court: Are you finished, counsel?

Mr. Valentine: Yes, sir.

The Court: Mr. Restaino, you have a right to speak in your own behalf. You can be assured that I will listen carefully to everything you tell me and give it such consideration as I think it may deserve. You may feel free to speak. My obligation is to hear you and to hear you fairly and to give reasonable consideration to everything that you tell me that I think deserves consideration. You may feel free to speak.

Defendant Restaino: The only thing I have to say is I have been looking for work. I am trying to get back together with my wife as soon as I get a job. I have been seeing my wife, you know, every day, and as soon as I get back to work we will set up an apartment again and go back together.

The Court: Anything further?

Defendant Restaino: No, sir.

Sentences and Applications for Bail

The Court: The information I have indicates a pattern of irresponsibility. It has been urged that the offense is not the kind that poses a threat to society. I am afraid that I disagree. I cannot think of any greater threat. I cannot think of any greater threat to law enforcement than the bribery of public officials.

Apparently it was felt here—and I don't hesitate to use the word *brazenly*—that public officials could be bought.

I presided at the trial. I heard the evidence, and while, as Mr. Valentine knows, and Mr. Restaino knows, I was most scrupulous and meticulously careful not to convey any impressions to that jury, advising and instructing the jurors that they were the sole judges of the facts, but I can say to you now that I have reached the same conclusion in my own mind that that jury reached.

It is the sentence of the Court in your case that you be placed in the custody of the Attorney General of the United States and by him or his accredited representative committed to an appropriate institution for a period of five years.

That is the sentence of the Court.

I might add in connection with this sentence that if it weren't for your youth and I would say perhaps a lesser role played in this, the sentence would have been more severe.

That is all.

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17078

UNITED STATES OF AMERICA,

v.

GERARDO RESTAINO,

Appellant.

No. 17079

UNITED STATES OF AMERICA,

v.

JOSEPH MUSTACCHIO,

Appellant.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued October 7, 1968

Before McLAUGHLIN, STALEY and VAN DUSEN,

Circuit Judges.

(Filed December 27, 1968)

Opinion of Court of Appeals

By STALEY, *Circuit Judge.*

Appellants, Joseph Mustacchio and Gerardo Restaino, were jointly tried and convicted by a jury of violating 18 U.S.C. § 201(b)[1] by bribing a public official. From their judgments of conviction these appeals followed.

Both appellants contend that the district court erred by confusing the jury with its charge on criminal intent.[2] In its initial charge, the court instructed the jury that criminal intent could be proven by circumstantial evidence and that it was permissible for the jury to draw the inference that a person ordinarily intends the natural and probable consequences of acts knowingly done. The court further charged that unless the contrary appeared from the evidence, the jury could infer that the defendants intended all the consequences which one standing in like circumstances and possessing like knowledge would have reasonably expected to have resulted from any act knowingly done. At the close of

---

[1] "201(b). Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

"(1) to influence any official act; or

"(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

"(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty * * *

"Shall be fined not more than $20,000 * * * or imprisoned for not more than 15 years, or both * * *." 18 U.S.C. § 201.

[2] This contention, and the alleged support therefor, is set out in Mustacchio's brief. Restaino indicated in his brief that he adopted Mustacchio's argument on this point *in toto*.

the charge, Mustacchio's counsel objected to the "natural and probable consequences" instruction on intent, *cf.* United States v. Barash, 365 F.2d 395, 402 (C.A. 2, 1966), and requested that it be qualified in certain respects. In response to this request, the court excused the jurors and instructed them not to begin their deliberations. Mustacchio's counsel was then asked to write out and submit to the court a remedial instruction that would cure any error in the initial instruction. Counsel did this, but then asked the court to withdraw his proposed corrective instruction because he apparently believed it to be inadequate. After an extended discussion, agreement was reached between Mustacchio's counsel and the court concerning the substance of the corrective instruction. The jury was then called into the courtroom and given the supplemental charge. Counsel for both defendants indicated their satisfaction with the court's revised charge.[3]

We have carefully examined the corrective instructions, and we fail to see how confusion could have emanated from the district court's patient and judicious handling of this matter. Aside from the fact that appellants' counsel did not object to and actually agreed with the supplemental instruction, the record clearly discloses that the court directed the jury to ignore its previous instruction regarding criminal intent and then proceeded to set out in detail the proper criteria for determining the existence of *mens rea*. We must assume that the jury followed the court's instructions, Cook

---

[3] After the jury retired, the court stated that "in accordance with my suggestion, at the completion of my supplemental instructions each of counsel for the defendants nodded their agreement, which I take it is to the effect that they were satisfied with the remedial instructions."

The record shows that counsel for appellant Mustacchio responded, "yes, sir."

v. United States, 354 F.2d 529 (C.A. 9, 1965), for "[t]o say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions". Opper v. United States, 348 U.S. 84, 95 (1954). There was clearly no reversible error here.

In a related contention, Mustacchio argues that the jury may have been confused by the court's charge that the Federal Aider and Abettor Statute, 18 U.S.C. § 2,[4] might apply depending on how the facts were found. Here again we note that although the district court allowed ample opportunity for counsel to object to any portion of the charge, no objection was voiced concerning this instruction. In the absence of a timely objection in the district court, Mustacchio cannot raise the issue here unless he establishes that the aiding and abetting charge constituted plain error. F.R. Crim. P. 30, 52(b). See also, United States v. Casavina, 368 F.2d 987 (C.A. 3, 1966), cert. denied, 385 U.S. 1006 (1967); United States v. Provenzano, 334 F.2d 678, 690 (C.A. 3, 1964). This he has not attempted to do; he merely alleges that the charge could have created some confusion. Our examination of the charge convinces us that there is no basis for this contention. The court properly advised the jury of the possible application of 18 U.S.C. § 2, and we can see no error—plain or otherwise. *Cf.* United States v. Provenzano, supra at 690-691.

Mustacchio next argues that he was denied the effective assistance of counsel because his counsel had been contacted only the day before the case came to trial and the

[4] The Aider and Abettor Statute, 18 U.S.C. § 2, punishes one as a principal who indirectly causes an act to be done which, if done directly by him, would be an offense.

district court abused its discretion in denying his request for a continuance to prepare the defense. In Ungar v. Sarafite, 376 U.S. 575 (1964), the Supreme Court stated:

> "The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel." 376 U.S. at 589.

It is apparent from the Court's opinion in *Ungar* that there are no mechanical tests for determining an abuse of discretion; rather, careful attention must be given to the facts of each case when deciding whether there was a due process violation. The record in the instant case discloses that three different attorneys represented Mustacchio and that a continuance was caused when the second attorney was discharged as trial became imminent.[5] The record also

---

[5] On the morning of their arrest, both appellants were represented by Mr. Querques before the United States Commissioner. Later, both men were represented by Peter Valentine at the arraignment on August 18, 1967. The case was listed for trial on September 26, 1967. On that date Mr. Valentine informed the United States Attorney that he would not represent either appellant because he had not obtained a retainer from them. A retention of counsel hearing was then scheduled for September 29, 1967, and the trial date adjourned to October 2, 1967. At the September 29 hearing, Mr. Valentine disclosed that he had been retained by Restaino but that Mustacchio did not wish to be represented by him. Trial was then continued until October 10, 1967, to allow Mustacchio to retain counsel. One week later, on October 6, 1967, a second retention of counsel hearing was held at which Mustacchio appeared and requested another continuance, saying that he had been unable to secure an attorney. The request was refused, and Mustacchio was told to get a lawyer by October 10, the date of the trial.

When court convened on October 10, Mustacchio appeared with attorney Matthew P. Boylan, who informed the court that he had

reveals that Mustacchio's counsel was given the Government's entire file prior to the commencement of the trial, and that Mustacchio was defended in a highly competent and professional manner.[6] As stated by the Court of Appeals for the Second Circuit in United States ex rel. Davis v. McMann, 386 F.2d 611, 618-19 (C.A. 2, 1967), cert. denied, 390 U.S. 958 (1968):

> "* * * Though a defendant has a right to select his own counsel if he acts expeditiously to do so, Releford v. United States, 288 F.2d 298 (C.A. 9, 1961), he may not use this right to play a 'cat and mouse' game with the court, Releford v. United States, 309 F.2d 706 (C.A. 9, 1962), or by ruse or stratagem fraudulently seek to have the trial judge placed in a position where, in moving along the business of the court, the judge appears to be arbitrarily depriving the defendant of counsel. * * *"

On the facts of this case, we are unable to perceive any violation of Mustacchio's Sixth Amendment rights. *Cf.* United States v. Abbamonte, 348 F.2d 700 (C.A. 2, 1965),

---

been called in on the case on October 6 and had talked to Mustacchio briefly on October 9 but had informed appellant that he could not represent him unless a continuance was granted to allow him time to prepare the case. The trial court refused the continuance and ordered Mustacchio and attorney Boylan to discuss the matter and make a definite decision as to the representation. The decision was made that Mr. Boylan would represent Mustacchio. He then requested that trial be adjourned for another week, a request denied by the trial judge.

[6] A reading of the transcript of the trial discloses numerous objections made by counsel for Mustacchio that demonstrate his thorough understanding of the case. The objection to the court's initial instructions on criminal intent was made by Mr. Boylan and the ensuing discussion on this point with the trial judge indicates the competence on the part of counsel in this case.

cert. denied, 382 U.S. 982 (1966); Leino v. United States, 338 F.2d 154 (C.A. 10, 1964); United States v. Bentvena, 319 F.2d 916 (C.A. 2), cert. denied sub nom. Ormento v. United States, 375 U.S. 940 (1963), *with* United States ex rel. Mathis v. Rundle, 394 F.2d 748 (C.A. 3, 1968).

Restaino's only argument, other than his adoption of Mustacchio's challenge to the district court's charge on criminal intent, is that the sentence imposed on him was unduly harsh and oppressive and constituted an abuse of discretion. Our study of the record discloses no abuse, and since the sentence imposed by the district court was in conformity with the statute, it is not reviewable here. Gore v. United States, 357 U.S. 386 (1958); United States v. Brown, 382 F.2d 52 (C.A. 3, 1967); United States v. Frank, 245 F.2d 284 (C.A. 3), cert. denied, 355 U.S. 819 (1957).

We have given due consideration to all contentions advanced by appellants; we find no merit in any of them. Accordingly, the judgments of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17,078

UNITED STATES OF AMERICA

vs.

GERARDO RESTAINO and JOSEPH MUSTACCHIO

GERARDO RESTAINO,

Appellant.

(D. C. Criminal No. 342-67)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present:

McLAUGHLIN, STALEY and VAN DUSEN,
Circuit Judges.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed January 5, 1968, be, and the same is hereby affirmed.

Attest:

M. ELIZABETH FERGUSON
Chief Deputy Clerk

December 27, 1968

In the Supreme Court of the United States

OCTOBER TERM, 1968

Nos. 972 and 973

JOSEPH MUSTACCHIO and GERARDO RESTAINO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1968. The petitions for writs of certiorari were filed on January 24, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

---

[1] "Pet." references herein refer to the petition in No. 972.

QUESTIONS PRESENTED

1. Whether there was plain error in the court's instructions.

2. Whether petitioner Mustacchio was denied the effective assistance of counsel by the refusal of the trial judge to grant an additional continuance on the day set for trial.

3. Whether the sentence of five years' imprisonment imposed on petitioner Restaino should have been reduced on appeal.

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of attempting to bribe federal agents with intent to influence an official act, in violation of 18 U.S.C. 201(b). Petitioner Mustacchio was sentenced to seven years' imprisonment and petitioner Restaino to five years' imprisonment. The court of appeals affirmed (Pet. App. A).

In the early morning hours of August 10, 1967, in Nutley, New Jersey, F.B.I. agents stopped petitioner Restaino's car and arrested him for possession of goods stolen from an interstate shipment. Petitioner Mustacchio (who had been following Restaino in another car) approached agents Lally and Bates and asked whether they could "make a deal to get [Restaino] off the hook" (35b-38b, 130b-131b).[2] Mus-

---

[2] "b" references are to the appendix for the United States in the court below, containing substantial excerpts from the

tacchio offered to let Bates and Lally "name your price" (131b). Mustacchio indicated that he did not have a large amount of money with him but that he would go to a nearby town and get it (39b, 132b). After some further discussion in Restaino's presence, Mustacchio offered to pay each of the agents $500 (39b, 132b-133b). Restaino was then taken to the Newark Office of the F.B.I. He told agent Lally that he had doubts that Mustacchio could raise the money but stated that he (Restaino) would give $500 each to Lally, Bates and the United States Attorney if he was set free without being charged (133b-134b). At about 5:30 a.m. Mustacchio appeared at the F.B.I. office and met in an interview room with Restaino and agents Lally and Bates. Mustacchio said that he had the money and offered to conclude the deal (135b). Lally stated that, while they had been waiting, Restaino had offered $500 each for himself, agent Bates and the United States Attorney. Mustacchio replied that he thought the deal was for $1,000, and that was the amount he had raised. He gave ten $100 bills to Restaino, telling the agents that that was all he and Restaino could get (136b). Lally asked Mustacchio to leave the room so that the agents could finish the interview with Restaino. Mustacchio left and, after closing the door, was arrested for bribery by other agents (137b). Restaino then told agents Bates and Lally that he would obtain the additional $500 if they would accept the $1,000 and release him. He said

---

testimony at trial; "a" references are to petitioners' appendix in the court below. A copy of each of these appendices is on file with the Clerk of this Court.

there would be no problems for the agents and requested them to destroy their records of his arrest. He then handed the $1,000 to Lally and was immediately arrested for bribery (136b-137b).

2. In his initial charge, the district judge instructed the jury that criminal intent could be proven by circumstantial evidence and that it was permissible for the jury to draw the inference that a person ordinarily intends the natural and probable consequences of his acts knowingly done (22a). At the conclusion of the charge, Mustacchio's counsel objected to the "natural and probable consequences" instruction, on the ground that it allowed the jury to find the requisite intent to influence official conduct solely from the fact of payment of the money. The court excused the jury and directed them not to begin their deliberations. After an extended discussion, agreement was reached between the court and defense counsel as to the content of a corrective instruction (48a-57a). The jury was called back and the court then gave the following instruction, which counsel for both petitioners accepted as satisfactory (66a; Pet. App. A, p. 3 fn.):

> * * * I am instructing you now to ignore that instruction [that a person ordinarily intends the natural and probable consequences of his actions knowingly done] and accept this: In seeking out the element of intent you and you alone draw the inferences and the inferences that you may draw should be drawn from all of the evidence and all of the facts knowingly done. I do not suggest and I did not mean to suggest by the instruction

that I gave you before that any particular act would require you to draw an inference of criminal intent. I do not suggest in any way the inferences that you are to draw. I merely say in respect to the existence or non-existence of criminal intent you must look to all of the evidence * * * to all of the acts on the part of either defendant in connection with his innocence or guilt which were knowingly done.

I have also stated to you in connection with a corrupt payment that if you find that there was a payment of money to Agent Lally by a defendant with criminal intent to induce him and other agents of the Federal Bureau of Investigation, while they were engaged in the performance of their official duties, to do or omit any act in discharge of such duties, such payment of money would be an act corruptly done. Here again I instruct you that you are not to confine yourselves to the payment of money alone, if you find that money was paid, but you are to consider all facts and all circumstances as developed by the evidence, and it is your exclusive province to determine the reasonable inferences to be drawn, and it is your exclusive province to draw those inferences.

I do not suggest nor have I intended to suggest to you inferences, if any, you should draw from any particular act * * * in this case, so bear that in mind, and I instruct you that insofar as my previous charge indicated that you might consider the payment of money as a corrupt act of bribery, I advise you to ignore that. You may take it into consideration together with all other acts and all other circumstances in the determination of whether there was criminal inent * * * [63a-64a.]

ARGUMENT

1.a. Petitioners contend (Pet. 6-13) that the court's instructions on the specific intent to influence official conduct required by 18 U.S.C. 201(b) were insufficient. The court of appeals properly held that petitioners' failure to object to the charge given precludes any such attack. *United States* v. *Provenzano*, 334 F.2d 678 (C.A. 3); *United States* v. *Indiviglio*, 352 F.2d 276 (C.A. 2), certiorari denied, 383 U.S. 907; *Weldon* v. *United States*, 183 F.2d 832 (C.A.D.C.), certiorari denied, 343 U.S. 967. There is in any event no substance to their argument that the instructions were defective. Contrary to petitioners' assertion (Pet. 12), the proof clearly showed the "specific duties of the agents which the defendants were allegedly seeking to influence"—namely their duty to keep petitioner Restaino in custody. The court adequately instructed the jury as to the duties of the agents and properly charged that the "basic fact which is material is whether or not there was improper criminal conduct on the part of either of the defendants or both by way of bribery to secure the release of the defendant Restaino from custody" (23a-24a).

b. Although 18 U.S.C. 201(b) applies to any person who: "*directly or indirectly*, corruptly gives, offers or promises anything of value to any public official * * * with intent (1) to influence any official act" (emphasis added), the court also charged that, with respect to petitioner Mustacchio, the jury could also consider the effect of the provisions punishing as a

principal one who aids and abets the commission of a crime (18 U.S.C. 2), since the evidence showed that Mustacchio had not given the $1,000 directly to the agents (30a-32a). While the instruction may have been unnecessary in light of the language of Section 201(b), it was not prejudicial or confusing. As the court below held (Pet. App. A, 4), in the absence of any objection thereto, the giving of the aiding and abetting instruction did not rise to the level of plain error warranting reversal.

2. Petitioner Mustacchio also argues that he was denied the right to the effective assistance of counsel because the attorney whom he ultimately retained had been contacted only the day before the case was set for trial, and the trial judge refused to grant a continuance to allow more time to prepare the defense. The contention is fully answered in the opinion below (Pet. App. A, 5-7). As is there made clear, the record shows that Mustacchio had previously been granted two continuances to obtain counsel; that counsel finally chosen was the third lawyer to represent him in these proceedings; and that he defended Mustacchio "in a highly competent and professional manner" (Pet. App. A, 6). The trial court could reasonably conclude that Mustacchio was playing a "cat and mouse" game with the court regarding the matter of representation, in an effort to delay the trial. Moreover, the issues in the case were quite simple, the only possible witnesses being the two defendants and the agents. In these circumstances there was no abuse of discretion in denying a continuance.

3. Petitioner Restaino contends that the five-year sentence imposed on him was too severe. The sentence was, however, only one-third the allowable maximum for violation of 18 U.S.C. 201(b) and was fully merited by the evidence. The court took into account that Restaino "played a lesser role" by giving him a lesser sentence than that imposed on petitioner Mustacchio.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

FEBRUARY 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 333884 505